

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



CA 75-7519 B

IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

THE FIRST NATIONAL BANK OF CINCINNATI,  
*Plaintiff,*  
*against*

SIDNEY PEPPER,  
*Appellant-Cross-Appellee,*

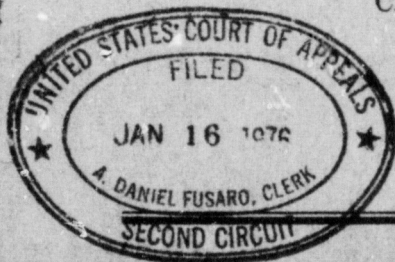
ROSALIE M. ARLINGHAUS, Individually; ROSALIE  
M. ARLINGHAUS, as Custodian for FRANK H. ARLING-  
HAUS, JR.; ROSALIE M. ARLINGHAUS, as Custodian  
for JOHN C. ARLINGHAUS; ANNA MARIE SCHLE-  
RETH; HARRY W. BOGAARDS, JR.; ELSIE W.  
COX; RICHARD M. HOUGH; RALPH J. DEL ORO;  
BERTHA A. BROGLIE; ALIX ANNE ARLINGHAUS,  
*Appellees.*

ROSALIE M. ARLINGHAUS, as Executrix of the Will of  
FRANK H. ARLINGHAUS,  
*Appellee-Cross-Appellant.*

On Appeal from the United States District Court  
for the Southern District of New York

**BRIEF FOR APPELLEES  
AND CROSS-APPELLANT**

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IN THE  
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SIDNEY PEPPER,  
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ROSALIE M. ARLINGHAUS, Individually; ROSALIE  
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*Appellee-Cross-Appellant.*

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On Appeal from the United States District Court  
for the Southern District of New York

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**BRIEF FOR APPELLEES**

The eight appellees alleged that they and the other in-  
dividual defendants except Sidney Pepper ("Pepper")  
owned all of the stock of Modern Talking Picture Service,

Inc. ("Modern"); that Pepper was Modern's general counsel and was the attorney for appellee Rosalie M. Arlinghaus ("Mrs. Arlinghaus"), individually and as executrix of her husband's estate; and that Pepper was discharged by Modern and Mrs. Arlinghaus as a result of a stockholder's suit in which it was established that Pepper had been guilty of self-dealing and other violations of his fiduciary duties (12a-13a). Thereafter, knowing that the stockholders had been given an offer for the purchase of all of Modern's stock and that the offer was about to expire, Pepper presented Modern and all of its stockholders with a demand for a large sum for legal services that he had not performed and asserted an attorney's lien to which he was not entitled on Modern's books and on stock certificates in his possession representing a majority of Modern's shares (13a-14a). Pepper refused to accept substitute security and obstructed the summary proceeding which Modern and the owners of the certificates brought for the speedy return of the books and certificates. On the day the offer was to expire, Pepper presented the stockholders with an ultimatum in the form of an agreement, drafted by his attorney, for payment to him of \$75,000 of the proceeds of the sale as his price for turning over the books and certificates (14a-15a). The stockholders had no choice but to sign the agreement in order to be able to tender their shares and close the sale (15a). After the closing of the transaction, the stockholders notified the purchasers, for whom plaintiff acted as disbursing agent, that they had elected to revoke the agreement and assignment (16a). The instant interpleader action followed.

The relief appellees sought and obtained was rescission of the agreement and assignment on the ground that their signatures to the agreement and assignment were obtained through unlawful restraint of goods, economic

duress and abuse of the fiduciary relationship. Appellees contended that there were four reasons why Pepper had no attorney's lien on the Modern books and stock certificates on June 7, 1968. (1) Pepper had no lien because he had rendered no services for which he had not been compensated. (2) If Pepper had rendered services for which he had not been compensated, they were not services rendered by him as a lawyer but as a business broker in search of a finder's fee. (3) If Pepper had rendered authorized legal services for which he had not been compensated, he had forfeited all right to compensation for those services by his self-dealing, conflicts of interest and other disloyalty. (4) If Pepper had rendered legal services and had not lost his right to compensation by his conduct during the period of the retainer, Pepper forfeited all right to claim a lien on his clients' property because of his professional misconduct and his misuse of the lien subsequent to his discharge on May 22, 1968.

In *First National Bank of Cincinnati v. Pepper*, 454 F. 2d 626 (2nd Cir. 1972), this Court explicated the law to be applied by the trial judge herein. After a careful review of the authorities, the Court held that, if appellees should prove the allegations of their pleading, they would be entitled to judgment rescinding the agreement with Pepper of June 7, 1968.

At the trial, appellees met this burden of proof\* to a fare-thee-well. They called as their first and principal

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\* When a transaction between an attorney and his client is challenged by the client, it is the attorney who had the burden of proof. *In Re Maxwell*, 215 N.Y. 466, 472 (1915); *Feiber v. Copeland*, 232 App. Div. 504, 250 N.Y.S. 429, 432 (1st Dep't. 1931). His conduct is presumed to have been oppressive. *Evans v. Ellis*, 5 Denio 540 (Ct. of Errors, 1846). Since appellees' contentions are established by the overwhelming weight of the evidence, the point is academic.

witness Pepper, who, in three days of testimony, was given every opportunity to explain to Judge Frankel his various claims for asserted legal fees and disbursements and was thoroughly cross-examined about his dealings with Modern and appellees. Appellees also called as their own witnesses the attorney, Jack Rosen, who represented Pepper in the summary proceeding in the New York Supreme Court, and read from the deposition of Pepper's co-broker, Steve Weil. Appellee Rosalie M. Arlinghaus gave testimony in court, as did her counsel and three other witnesses. Finally, Judge Frankel had before him the complete transcript of the hearing in the stockholder's suit in the Delaware Chancery Court, as well as depositions of six former stockholders and two officers of Modern. On this complete record, consisting to a large extent of Pepper's own testimony and writings, Judge Frankel found that all of the four grounds for rescission (*supra*) had been established. Thus, he found that (1) Pepper lacked any valid claims for fees from anyone (438a); (2) Pepper was strongly motivated by an interest in seeking a profit for himself from the sale of Modern (441a); (3) the fee of \$100,000 to which Pepper claimed to be entitled was not a legal fee, but a finder's fee to which his right, if any, was deeply doubtful (443a); and (4) Pepper engaged in a course of delay and obstruction designed to maintain the leverage of his liens at all costs and avoid any proceeding that might subject his claim for alleged services to orderly and impartial scrutiny (445a). Judge Frankel concluded that, under these circumstances, appellees had behaved reasonably as practical people (451a). Accordingly, Judge Frankel held that the agreement was the result of duress exerted by Pepper on appellees (453a); that appellees' hands were not unclean; and that, in any event, Pepper's serious breaches of the lawyer's duty of good faith and fair dealing with former clients

made his by a wide margin the greater (if not the only) offenses against equity and good conscience (454a).

There is nothing here for his Court to review. The applicable rules of law have already been thoroughly analyzed and explained by this Court. Pepper does not, and could not, complain that Judge Frankel overlooked or misapprehended those rules. Pepper does not complain of Judge Frankel's rulings on objections to evidence. The basic thrust of Pepper's arguments is that Judge Frankel erred in disbelieving Pepper's testimony and believing the testimony of appellees and their witnesses—manifestly not a matter for appellate review. This is the short, sufficient answer to Pepper's brief. Since Pepper has attempted to dress up his credibility arguments in the guise of arguments going to the sufficiency of the evidence, we are constrained to present also the long answer, taking Pepper on his own terms. To do so, we shall discuss below the evidence which supports the findings made by Judge Frankel.

**Pepper rendered no legal services  
for which he was not compensated**

*Pepper's Alleged Services to Modern.* During the period in question, Pepper rendered services to Modern as its general counsel under a written retainer dated January 4, 1966 (499a). The retainer agreement, which is in the form of a letter from Pepper to Carl H. Lenz, president of Modern, contains the following sentence:

“No charge shall be made by us for any legal services not covered by the retainer except with your [i.e. Lenz's] prior approval.” (499a).

Pepper was paid \$1,000 a month under the retainer. He claims that he rendered services beyond his retainer in

"screening" corporate suitors (41a). There is no doubt that Lenz on several occasions asked Pepper to obtain information about, or furnish information to, interested purchasers. These services obviously were the type of services routinely performed by the general counsel of a corporation. The evidence is clear—and Pepper himself, after dodging the question over four pages of the transcript (44a-47a; see also 41a-43a), admitted—that Lenz neither authorized nor ratified any separate charge for such services (47a). Nor does Pepper claim that he even asked Lenz for approval. No question was ever raised about this matter until Pepper's discharge. Pepper's claim that the services were not covered by the retainer hinges entirely on his own testimony; and if anything is clear from Judge Frankel's opinion, it is that he gave no credence whatever to Pepper. And for good reason. When, after five years of evading the question, Pepper was finally required, on his deposition in this action, to explain his claim that he had rendered legal services for which he had not been paid, he produced a meaningless heap of printed corporate reports and literature, as well as a series of memoranda from Pepper to Pepper and a few letters (503a-552a) as "proof" of his services. To exemplify his services, the best Pepper can do on this appeal is to point to (1) his own inter-office memorandum and a letter about management's interest in Bell & Howell Company, (2) letters to Lenz from a broker, McCandless, who tried to interest Lenz in two unidentified possible merger partners and (3) a series of four letters between Pepper and Wometec Enterprises, Inc. (Appellant's Br., pp. 4-5). Of these, the Bell & Howell letter (501a) and memorandum (507a) show nothing more than that Lenz had asked Pepper to give a Bell & Howell vice-president information about Modern; that Pepper did so over the telephone; and that thereafter there were further talks,

in which Pepper did not participate. The McCandless letter (538a) shows that the writer had been pursuing Lenz with sundry prospects. In the penultimate paragraph, the writer suggested a meeting with Lenz "and possibly Sidney Pepper" to secure financial data and discuss "objectives". The Wometeo correspondence (531a-536a), far from contributing proof of services performed by Pepper as an attorney, reflects Pepper's efforts as a broker. (See the discussion below). Thus, Pepper's letter of October 31, 1967 (533a) is his broker's prospectus to Wometeo. Notably, no copy was sent to Lenz (534a). Likewise, while a copy of Wometeo's initial letter (531a) went to Pepper's co-broker, Steve Weil, no copy of any of the Wometeo letters was sent to Lenz (531a-536a).

It is a sign of Pepper's utter desperation that he ends up listing even his work (if any) on the proposed Sonderling contract\* as justification for his claim of lien. If anything is clear from the evidence, and particularly from Pepper's own testimony and writings, it is that Pepper's dealings with Sonderling were so permeated with self-interest and disregard of his clients' interests that Pepper would in all events have been barred from recovering anything for legal services if he had convinced the Court that he had rendered any in that connection. (See the discussion below).

If Pepper had performed substantial legal services outside his retainer over the claimed period of two years, Pepper would have taken the matter up with Lenz much before his discharge. The plain fact is that whatever legal services, if any, were involved in meeting management's request for information about, or furnishing in-

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\* There is no credible proof that the draft contract (553a *et seq.*) was Pepper's work.

formation to, potential buyers fell within his retainer; and if they had not, it would obviously have been too late for Pepper to obtain "prior approval" after the rendition of the services and after his discharge. Clearly, Judge Frankel, who not only had all of these papers before him, but also had the opportunity to observe Pepper's demeanor on the witness stand over three days, was justified in rejecting *in toto* Pepper's claim that he was owed something from Modern beyond the amounts paid him under his retainer.

Pepper argues that Judge Frankel's interpretation of his written retainer agreement with Modern would have required Pepper to "handle" the Sonderling transaction for nothing (Appellant's Br., p. 21). There is an obvious fallacy in this reasoning. Judge Frankel found (and it is undisputed) that the Sonderling transaction came to naught. If it had materialized, if Pepper had "handled" it for Modern, and if there had been no question of conflict of interest or other impropriety, a different result would have been reached by Judge Frankel. These hypothetical issues are quite clearly not before this Court.

*Pepper's Alleged Services to Appellees and Howard Eberle.* After asserting that the so-called screening services were performed for, and should be compensated by, the corporation, Pepper unblinkingly asserted that the very same services were performed for the stockholders and that *they* owed him for them (Tspt. 35). Again, Pepper produced nothing but his own testimony to support his claim. Judge Frankel found Pepper's testimony to be fabrication and credited instead the testimony of Mrs. Arlinghaus and the other stockholders.

None of the stockholders who were deposed by Pepper's attorney acknowledged any liability on their part to Pepper for legal services. The only one among them

who had thought that Pepper should be paid something was Harry Bogaards, Pepper's then personal client. Bogaards had no direct knowledge of any legal services rendered by Pepper in connection with the attempt to sell Modern. His only reason for thinking that Pepper had performed such services was that Pepper had mentioned several proposals to him on the telephone (186a). Bogaards was obviously surprised at the suggestion that something might be due Pepper *from the stockholders* (184a). Bogaards thought that whatever Pepper had done was done for the corporation (181a).

Equally lacking in substance is Pepper's contention that Judge Frankel erred in finding that Pepper had rendered no compensable services to Howard Eberle. Such services as Pepper had rendered (evidenced by a simple trust agreement, a perfunctory U.S. Fiduciary Income Tax Return, both dated 1965 (three years before Pepper asserted his claim) and a one page substitution of trustee, sworn to March 22, 1968 (466a; 489a, Exh. CC)) were obviously rendered without any expectation of payment. Eberle testified at his deposition that he never owed Pepper any money (205a); and although both Pepper himself (see 212a-213a) and his attorney, Ben Matthews (see 213a), were present at the deposition and cross-examined Eberle, they did not ask Eberle a single question about the rendition of, or payment or liability for, any services rendered by Pepper for Eberle (201a-224a). Pepper had rendered similar services (the drafting of a will) to at least one other stockholder and former employee, Miss Schlereth, as a favor (238a). Pepper did not offer into evidence any bill rendered to Eberle or even testify that he had ever made a demand on Eberle for payment for those services. Pepper's claim of services rendered to Eberle merely demonstrates how desperately Pepper is grasping for straws in this litigation. If Pepper had had proof

of a legitimate claim for legal services, surely he would not have resorted to dredging up old services of friendship and dressing them up as services rendered for compensation.

### **Pepper's self-dealing**

Judge Frankel's findings that Pepper engaged in self-dealing and committed breaches of his attorney's duty of good faith and fair dealing are also supported by solid, convincing evidence. Throughout Pepper's own testimony, in the District Court and at the Delaware hearing, ran a leitmotif of self-interest. The reason Pepper dealt with the companies with which he dealt was not that he needed to do so in order to render legal services, except in the few instances when Lenz asked him questions about particular companies. His reason was that he wanted to collect a finder's fee. The record established this fact to a certainty:

1. Lenz testified that Pepper spoke with a number of people (prospective buyers) who, at Pepper's suggestion, would contact Lenz (252a). One such prospect was Wometco (298a-299a), whom Pepper had found through Steve Weil and Harris Shapiro (414a-415a), Pepper's co-brokers (see below).

2. Pepper, besides being a lawyer, was a business broker. He testified at the Delaware hearing that he had been asked by Fuqua to broker a merger between Fuqua and Wometco (Exh. 1-E, pp. 261-262). It was in his capacity as broker that Pepper had made contact with the Shapiro-Weil constellation (414a-415a; see 369a-371a).

3. In September, 1967, Pepper had come to management with a proposal that management and Pepper to-

gether buy 40 percent of Modern's stock from the stockholders, including Pepper's clients, at \$10 a share and then sell Modern at a higher price per share for a capital gain\* (270a-272a; 399a *et seq.*). Modern's management had turned Pepper down (275a). This explains Pepper's testimony that it was in late 1967 that he started looking for an "acceptable deal" for the stockholders (85a). Having been unable to buy a share of the company at a bargain price, he decided that he was going to make his killing in the form of a finder's fee, instead.

4. Pepper reviewed prospects submitted by others without any apparent enthusiasm; but when Sonderling, introduced by Shapiro and Weil (with whom Pepper, as noted above, had a working relationship (385a; 414-415a)), appeared as a prospective purchaser, Pepper at once embraced Sonderling's proposition and took what can only be described as near-hysterical action in attempting to push through the deal. His sense of urgency was spurred by the presence of another serious bidder, Sherman Unger, who showed no interest in Pepper's scheme for a finder's fee (342a; see 75a-76a).

This was the chronology: Pepper first met Unger on March 12, 1968 (337a-338a), after Unger had made an offer of \$21 for Modern's stock and extended an invi-

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\* Pepper would have taken ten percent in his wife's name. (*Ibid.*). This was a ploy Pepper had used in Modern's sister company, Modern Teleservice, Inc. ("Teleservice"). The Teleservice stock which Mrs. Pepper had bought for \$10 a share in the fall of 1967 was, in the sale of Teleservice to Sonderling on April 8, 1968, exchanged for Sonderling stock worth more than \$60 a share. In the companion action, *Arlinghaus v. Ritenour et al.* Docket No. CA75-7616, Judge Werker set aside Pepper's purchase of Teleservice shares from Mrs. Arlinghaus and the estate, awarding both compensatory and punitive damages to Mrs. Arlinghaus and the estate.

tation for a counter-offer. At their first meeting, Pepper told Unger that he contemplated a \$100,000 fee for selling the company (342a). Unger listened with concern. (*Ibid.*). A few days later Unger, pressing for a counter-offer, asked Pepper to arrange a meeting with Mrs. Arlinghaus and Eberle for March 19 (343a-344a). Instead of doing so, Pepper on March 20 obtained a written offer from Sonderling to buy the assets or stock of Modern (623a),\* signed an agreement for sharing of the finder's fee with Shapiro on March 21, 1968 (633a), arranged to have this agreement signed "approved" by Mrs. Arlinghaus and Eberle and, on March 22, had Mrs. Arlinghaus and Eberle approve, and, on their behalf, sent to Sonderling, a letter accepting Sonderling's offer to purchase Modern.\*\* Modern's board met the same day (274a-275a). Although Sonderling's overriding interest at the outset had been in purchasing the *assets* of Modern (364a), Pepper concealed from the board that Sonderling had made an offer for Modern which had been accepted by Mrs. Arlinghaus and Eberle, who together held some 70 percent of the stock (78a-80a; 275a).

On March 21, Pepper called Unger in Cincinnati and pretended to set up a meeting for Unger with Mrs. Arlinghaus and Eberle at the Americana Hotel, where Eberle was then staying, on March 25. But Unger subsequently

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\*The Sonderling letter was drafted by Weil and Sonderling in New York on March 20; Sonderling revised it in the plane on the way to Chicago the same day, for delivery to Weil in New York by the next plane (229a-230a). Speed obviously was of the essence.

\*\*The degree of independence exercised by Eberle in this transaction is shown by Eberle's subsequent testimony that, as late as April 5, 1968, he did not really know what kind of offer Sonderling had presented (306a-307a).

learned that Eberle had returned to Florida, and, on March 23, Pepper called Unger and told him he did not think Mrs. Arlinghaus would be interested in his offer. A quick telephone call by Unger to Mrs. Arlinghaus established that, contrary to Pepper's assertion, she was indeed interested in talking with Unger. Unger did in fact meet her in New York. Pepper, uninvited, appeared at their meeting but did not disclose that he had already made a deal with Sonderling (346a *et seq.*).

When Unger called Mrs. Arlinghaus on April 7, however, she informed him that she had decided to take "the other offer." Unger wanted her to inform him of the price of that offer, but she told him: "I don't think I am allowed to." (357a). Pepper himself never told Unger Sonderling's price. (See 397a-398a). In fact, Pepper admitted in Delaware that the only other potential purchaser to whom he gave the \$2,500,000 net figure (which was to be increased by the \$300,000 brokers' fees) was Fuqua; and, when the cross-examiner pressed the question, Pepper, in his familiar manner of testifying, eventually conceded that he had not asked \$2,800,000 of Fuqua "in so many words." (398a-399a).\*

At the board meeting on March 22, Pepper had his "associate" and "backstop" (417a-418a), Edmund Cox, elected to the board (Tspt., pp. 499-450; 425a; 426a), undoubtedly to vote at the next meeting with Pepper, Arlinghaus and Eberle to override the other directors' objections to the then undisclosed Sonderling deal. A meeting between management and Sonderling was arranged for April 5 (83a). Pepper asserts that at this meeting, he showed a copy of Sonderling's letter to Modern's direc-

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\* Pepper's contrived reasons for not quoting Unger a price (418a-419a) were thoroughly refuted by Unger (430a-432a).

tors. The record, however, shows that the members of Modern's management present, including three directors (Oard, Lenz and McCallum) and the secretary-treasurer (Vickers), were refused information even as to the price which Sonderling had offered (264a-266a; 105a-106a). Oard and Vickers did not see a copy of Pepper's March 22 acceptance letter until May, when McCallum had procured a copy (269a; 300a). By contrast, Pepper's "back-stop" director, Edmund Cox had been shown Sonderling's letter on the day of the board meeting, April 8 (426a-428a).

After two adjudications against him on the issue (Exh. 1-E, pp. 306-308; 442a), Pepper still maintains that he should not be faulted for withholding from Modern's Board the terms of Sonderling's offer and the fact that he had gotten it accepted by Mrs. Arlinghaus and Eberle (Appellant's Br., p. 28). He rests his case on his assertion, weakly corroborated by Weil (231a) but firmly contradicted by Oard's Delaware testimony (265a-267a), that Weil delivered a copy of Sonderling's letter to one of the management members of the board (Appellant's Br., p. 28). Judge Frankel took account of this assertion and rejected it (442a). The letter, moreover, did not contain the detailed terms of the offer (640a-641a) and, of course, bore no evidence that the offer had been accepted by Pepper.

At the April 8 meeting, Pepper refused to furnish the board with written copies of his resolution,\* by which it was proposed to sell the assets of the company to Sonderling in a transaction which, even in Pepper's second, expurgated version of the minutes, contained uncertainties

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\* The original, oral resolution, taken down by Vickers, was one of the main bases for the temporary injunction granted by the Delaware Chancellor (276a-288a).

and highly dubious provisions (639a-644a). Immediately before the meeting, Pepper had had Mrs. Arlinghaus sign a copy of a document entitled "Consent". (646a). He had rushed her to the point that, without having its contents explained to her, she put it on top of a filing cabinet in Modern's office to sign it (138a-139a). He gave her no copy of the document. (*Ibid.*). Thereafter, Pepper obtained the signatures of three other stockholders, Bogaards, Miss Schlereth and Miss Cox to the same "Consent". The former two, at least, signed on the faith of the Arlinghaus signature (176a-177a; 236a-237a). They did not know what they were signing. (*Ibid.*). Miss Schlereth "wasn't given that much time." (237a). Eberle signed the consent believing the Sonderling offer was superior to Unger's offer. (See 208a). At the Delaware Chancery hearing Eberle readily admitted his general lack of knowledge about the two offers (301a-328a).\*

The "Consent" contained a provision for payment to Pepper of \$100,000 which cannot be understood or interpreted to be anything other than a provision for a finder's fee (646a). The pertinent sentence reads as follows:

"The undersigned, being shareholders of Modern Talking Picture Service, Inc., a Delaware Corporation (hereinafter [*sic*] called Modern) do hereby consent in writing pursuant to Section 271 of the Delaware Corporation Law to the sale by Modern of substantially all of its property and assets to Sonderling Broadcasting Corporation, an Illinois

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\* In spite of the contrary finding by the Delaware Chancellor (434a), Pepper still maintains that Sonderling's price was a clean \$26.45. (Appellant's Br., p. 12). A side reading of Pepper's resolution of April 8, 1968 (277a, the original version; 640a-641a, Pepper's expurgated version) shows the lack of merit of this contention.

corporation, for the sum of \$2,800,000.00 in cash and with the assumption of all of the debts, liabilities, obligations, contracts and commitments of Modern upon such terms as may be approved by Howard H. Eberle and Edmund H. Cox, and Modern's payment to Commonwealth Corporate Development Co., Inc. of the sum of \$300,000.00, which has agreed to pay \$100,000.00 to Sidney Pepper, a director of Modern, and do hereby authorize such sale without further action by the Board of Directors of Modern."

The \$100,000 item referred to in line 18 clearly is the \$100,000 commission referred to in the Commonwealth letter (634a). There was no mention of legal services in the "Consent". Pepper's status as counsel to Modern was not mentioned. The "Consent" did not even show that Pepper was a lawyer, whereas it did recite that Pepper was a director. The reason for this recital obviously was that, as a director, he was required to disclose his personal interest in the transaction about to be voted on by the board.

The \$100,000 fee was mentioned again in Pepper's proposed resolution submitted to the board at the April 8, 1968 meeting. This time the language was changed somewhat. The pertinent part of the resolution, as taken down by Modern's secretary, Vickers, read as follows:

"... and with \$300,000 payable to Commonwealth Development Corporation of Philadelphia for its services in bringing about such sale. Such above amount to be payable only if and when the consideration for such sale is received by the corporation, and with the understanding that Sidney Pepper, counsel and director for the corporation, is to make no charge to the corporation for his services

herewith, but is to receive \$100,000 commission from the Commonwealth Development Corporation, and with such further charges requested by counsel for Sonderling Broadcasting Corporation and acceptable to Mr. Eberle and Cox." (278a-279a).\*

The directors were not given any information about why Commonwealth was to receive \$300,000 (285a-286a). Even Eberle, who had signed the "Consent", had no idea why Pepper was to receive \$100,000 (309a).

Finally, Pepper prepared a third variant form of the "Consent", dated April 25, 1968. This time the relevant language read as follows:

"3. Of the moneys received by DeWitt, Pepper & Howell from Sonderling Broadcasting Corporation, they are hereby authorized to pay to Commonwealth Corporate Development Co., Inc. of Philadelphia, Pennsylvania, for its services in bringing about such sale the sum of \$300,000.00 of which half shall be payable on January 2, 1969, with authority to pay to Sidney Pepper, counsel and a director of Modern for his services in connection with such sale \$100,000.00 provided he is to make no charge to the selling stockholders for his services in connection with such sale." (649a).

Pepper testified that this "Consent" may have been abandoned after he got the first signature (82a). When he came around to appellee Hough with the "Consent,"

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\* The unsigned minutes produced by Pepper in this litigation, about which Vickers testified (109a) that they did not correspond to the minutes which Pepper had demanded that he sign, vary in important respects from the quoted language. Most importantly, they omit the characterization of the \$100,000 as a commission (640a).

Hough told him he was going to sue him to stop action on the first consent (Exh. E. p. 189).

When the Sonderling deal was challenged by Hough in the Delaware Chancery Court (Exh. 1-C), Pepper concealed this fact from Mrs. Arlinghaus (62a-63a; 64a; 70a). She was abroad. (*Ibid.*) While concealing the institution of this lawsuit from her, Pepper took it upon himself to retain counsel for her, in all her capacities, and to instruct counsel to appear in court for her, which counsel did (260a).<sup>\*</sup> He did not bother to inform Alix Ann Arlinghaus, the daughter of Mrs. Arlinghaus and a woman in her twenties who owned stock in Modern in her own name (see 829a), of the suit (63a).

There is only one explanation for this long series of violations of fiduciary duty and propriety: Pepper wanted to preserve the Sonderling deal because he had a personal interest in it—a finder's fee, which would be lost if the deal were lost. The deal fell through, and with it the fee. Judge Frankel so found, and his finding is soundly supported, and even compelled, by the evidence. His conclusion that Pepper's right to a finder's fee would in any event have been deeply doubtful is equally well supported. At the time when Pepper arranged the Sonderling transaction and claimed the finder's fee, he was acting as attorney for Mrs. Arlinghaus and for the estate of Frank H. Arlinghaus, the major stockholder, and as general counsel for Teleservice. There was a clear conflict of interest between Pepper, the attorney for Mrs. Arlinghaus and the estate, Pepper, the counsel for the corpora-

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<sup>\*</sup> Pepper asserted he had no recollection that he gave this authorization (67a-68a) but offered no other explanation as to how the attorney whom he retained to appear for Modern happened to appear as well for Mrs. Arlinghaus, her children and the Arlinghaus estate.

tion and Pepper, the broker in the transaction to which the corporation was a party and in which Mrs. Arlinghaus and the estate were interested. It is well established that an attorney cannot collect a broker's fee in a transaction in which he represents an estate, or any other client for that matter. That this rule is justified is eloquently illustrated by the instant case. The facts discussed above show clearly that Pepper, in pursuance of his own personal interests, favored the Sonderling asset deal and failed to pursue, and even sabotaged, Unger's efforts to bid and to buy on terms superior to the Sonderling asset deal.

5. That Pepper's claim was for a finder's fee is also clear from Pepper's subsequent prevarications whenever he was asked to explain the nature of his claims. When, at the time of his discharge, he was asked about his claim by Mrs. Arlinghaus' new counsel, Pepper stated that he wanted payment of \$100,000 as compensation for work done on the contemplated sale to Sonderling (661a-662a). Evidently, Pepper found it difficult to reformulate his claim for commissions as a claim for legal fees; he said it was not clear whether the \$100,000 was a joint obligation of the corporation and its stockholders but that it should probably be so considered. At any rate, Pepper wanted to be paid "by somebody". (*Ibid.*). At his deposition, Pepper first testified that Richmond Ritenour, the president of Modern's sister company, had told him that \$100,000 was a reasonable compensation "for procuring the sale of a business." (48a-49a). At a subsequent deposition session, Pepper asked to change the quoted language to read "for legal work in connection with the sale of a business." (49a-55a). At the trial, Pepper gave as his reason for the change, not that he had misquoted Ritenour, but that his previous answer "was subject to an interpretation that I had been acting as a finder." (56a). Appellees agree with Pepper in this instance.

The fanciful suggestion that Pepper was told by Sonderling to mask his claimed legal fee as a brokerage fee (Appellant's Br. p. 10) had no other support than Pepper's own, discredited testimony. Sonderling's president knew nothing about this (429a-430a).

At the trial, Pepper finally testified that the \$100,000 lien which he claimed on May 22 was for all services rendered in efforts to procure an acceptable deal and therefore was a different \$100,000 from the \$100,000 he was to get under the resolution of April 8 (45a-46a). But he went on to testify, entirely inconsistently, that Lenz, as a director, had given his approval of the all-services claim when the board passed the Sonderling resolution on April 8, 1968.\* (*Ibid.*). Clearly, then, Pepper himself equated the two \$100,000 fees, his repeated testimony to the contrary notwithstanding.

#### **Pepper's obstruction of the legal process**

*Pepper's Refusal to Return Records and Certificates, May 20, 1968.* On May 20, Mrs. Arlinghaus appeared at Pepper's office in the company of Vickers (141a-142a). Pepper was not in the office but was reached on the telephone. He told Mrs. Arlinghaus that the papers were not in his office (*Ibid.*).

*Pepper's Refusal to Return Records and Certificates, May 21.* When Modern's secretary and treasurer, Vickers, appeared at Pepper's office to retrieve the books and stock certificates on May 21, 1968, Pepper went for the papers (112a). After an hour, he returned and told Vickers he did not intend to deliver the records or the Arlinghaus certificates (*Ibid.*).

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\* The desperateness of Pepper's testimony is apparent from the fact that Lenz in fact voted against the resolution. (641a).

*Pepper's Refusal of Substitute Security.* On May 22, Mrs. Arlinghaus returned to Pepper's office accompanied by her new counsel, Kelly and Jensen, as well as Vickers and Oard (142a-143a). Kelly's version of what occurred in Pepper's office appears in a letter which he sent to Pepper the following day and in which he repeated the conversation which was had in Pepper's office. The penultimate paragraph of the letter read as follows:

"Please inform us promptly if you are of the opinion that the foregoing is incomplete or inaccurate in any respect." (660a).

The reason for the letter is clear. The previous day Pepper had claimed a lien in the amount of \$110,000 but had indicated his willingness to take a bond as substitute security. (*Ibid.*). Modern, Mrs. Arlinghaus and their counsel wanted to get written confirmation of Pepper's promise in that respect before paying the substantial premium on a bond. Little time remained. The original expiration date for Unger's tender offer was May 24, the closing of the transaction to be on June 7 (Exh. JJJ). Subsequently, Unger had agreed to extend the tender offer for an indefinite but limited period (Exh. 28, Affid. Lenz, para 11). Eventually, the tender offer was extended until the intended closing date, June 7 (see below).

In his reply to Kelly's letter, Pepper took no position on any part of Kelly's letter. He obviously had decided to engage in evasive tactics. His letter, dated May 24, 1968, read as follows:

"Dear Mr. Kelly,

I have your letter of May 23, 1968. Your letter is only partially correct as to what was said at our meeting.

I do not believe that at this time a statement of what was said at our meeting is called for.

Very truly yours,"

(364a).

Modern obtained a bond in the amount mentioned by Pepper, \$110,000, and, on May 29, Vickers and Jensen tendered the bond to Pepper at his office (115a-116a). Pepper refused to accept the bond (*Ibid.*).

*The Summary Proceeding.* On May 31, 1968, on the application of Casey, Lane & Mittendorf, New York Supreme Court Justice Mangan signed an order commanding Pepper's firm to show cause why an order should not be issued compelling it to turn over to Modern, Arlinghaus and Eberle their books, records and stock certificates in its possession (Exh. 28). On June 3, 1968, Justice Murphy of the same court issued an order to show cause to the same effect (721a and Exh. 29). On the representation of Kelly that diligent but unsuccessful efforts had been made to serve the previous order to show cause, Justice Murphy permitted substituted service of the motion papers on Pepper. (*Ibid.*).

Pepper retained Jack Rosen, Esq., to represent him. Rosen advised, and Pepper authorized, opposing the petition by objecting to the court's jurisdiction of the person of Pepper (Tspt. p. 402). Rosen did so by making a cross-motion to dismiss the petition (748a and Exh. 29). Besides jurisdictional defenses, Rosen made various procedural objections to the petition. (*Ibid.*). Rosen concedes that he also advised Pepper not to take substitute security (161a). He gives as his reason that, after you give up a lien, "[Y]ou can then proceed on claims in court and have an action pending there but he has given up this lien when the bond is filed." (*Ibid.*). Clearly, Rosen and Pepper knew that Pepper could not prove himself entitled

to a fee if he were to accept a bond and "proceed on claims in court."

Both of the attorneys who appeared for the parties testified about the proceedings had before Justice Riccobono on the return day, June 5, 1968. Rosen maintained that, when the judge asked him about petitioner's proposed bond, Rosen objected to what he claimed were defects in the bond (Tspt. p. 405) and told the judge that he could not consent to accept the bond without first looking into it further and discussing it with his client (*id.* p. 406).

Petitioner's counsel, Jensen, testified that Rosen had agreed during the argument before Justice Riccobono that a lawyer should accept security in lieu of a client's papers and that Globe Indemnity Company (the surety on the bond, see 719a) was a satisfactory surety (170a). Justice Riccobono thereupon directed Rosen to communicate with Jensen before 4:00 P.M. in order to work out the proper terms of the bond. (*Ibid.*). When Rosen did not do so, Jensen sent a letter by hand to Justice Riccobono, summarizing the proceedings had in Court that morning and asking the Court to sign a proposed order, included with the letter (759a and Exh. 29). The order was never signed (172a).

Rosen testified that Justice Riccobono had given him no instruction to communicate with Jensen before 4:00 in the afternoon of the day of the argument (Tspt. 409-411). Rosen's testimony in that respect is contradicted by Rosen's own letter, written to Justice Riccobono the same day, June 5, the third paragraph of which starts with the following words:

"I could not reach my client until 5 P.M. and was then advised that I could not consent to delivering the said documents. . . ." (764a)

In this letter Rosen told the judge he had been advised by his client that he could not consent to delivering the documents since, according to Pepper, Casey, Lane & Mittendorf had not been retained by Eberle. Eberle had not discharged Pepper, Rosen asserted, but had "specifically" directed Pepper not to deliver the stock and papers. (*Ibid.*).

The following day, Jensen sent to Justice Riccobono a letter with which he enclosed an affidavit of Kelly showing the fact of Eberle's retainer of Casey, Lane & Mittendorf (769a and Exh. 29). Also enclosed was a telegram from Eberle to Arlinghaus in which Eberle asked Arlinghaus to pick up the Eberle certificates (767a and Exh. 29). Rosen showed that telegram to Pepper (Tspt. p. 423). On his deposition Eberle testified that his reason for cabling Arlinghaus to pick up the Eberle certificates was that he had decided to tender them to Unger (202a-203a). This testimony by Eberle, together with the telegram, belies Pepper's assertion that Eberle had told him he "didn't have to" deliver the stock to Arlinghaus (73a).

In his brief on appeal Pepper continues to push his argument that Casey, Lane & Mittendorf was never retained by Eberle to institute the summary proceeding for return of his stock certificates. Since Pepper admittedly knew at least on June 6 that Eberle wanted his certificates back (*supra*), it is clear that, even if it were a fact that Casey, Lane & Mittendorf's appearance for Eberle was unauthorized, Pepper's case would not be helped in the least by that fact. The weight of the evidence, moreover, supports Judge Frankel's findings that Eberle had in fact retained Casey, Lane & Mittendorf for the purposes of the summary proceeding.

The retainer is established by the affidavit of Kelly delivered with Jensen's letter to Justice Riccobono on June

6 (see Exh. 29). Kelly executed that affidavit on June 6, 1968, eight days after the telephone conversation in which he was retained by Eberle. A comparable affidavit was submitted by Arlinghaus, who had spoken to Eberle during the same telephone call. (*Ibid.*). Kelly described his telephone conversation with Eberle in his report to the stockholders the following day, June 7, 1968:

"There then [June 5, 1968] appeared in our office a copy of a letter from Mr. Pepper's attorney, who had spoken with Mr. Pepper and understood that Mr. Eberle was not represented by our office and he wasn't going along with this entire affair.

We had anticipated that matter somewhat, and the night before had asked Mr. Eberle to send a telegram to Mrs. Arlinghaus, stating that she was, in fact, authorized to receive his shares, and the day before Memorial Day, had spoken to Mr. Eberle and had been retained by him for the sole purpose of going into court to get back his stock certificates from Mr. Pepper. That was conditioned upon his statement to Mrs. Arlinghaus and Mrs. Arlinghaus' statement to us that Mr. Eberle would not bear any legal costs of the proceedings, and Mrs. Arlinghaus agreed to do so." (805a-806a).\*

Five years later, when appellees' attorneys took Eberle's deposition in Florida, Eberle maintained that he had not retained Casey, Lane & Mittendorf for the summary proceeding (215a-223a). A close reading of Eberle's deposition testimony shows that the basis for that testimony was

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\* When Kelly was deposed years later, he had forgotten this incident (152a-153a). In view of Kelly's contemporaneous statements, in his affidavit and the meeting transcript, Pepper's sinister insinuations (Appellant's Br. p. 42) have no force.

less Eberle's actual recollection of the events than his continuing fear that someone, even now and in the instant proceeding, would send him a bill for lawyers' fees or court costs. (*Ibid.*). He was, moreover, not candid with counsel in pretending to have been "shocked" when he read a copy of Kelly's affidavit the previous day; for, as he admitted on cross-examination, he had in fact known of Kelly's affidavit earlier, when Pepper's counsel sent him a copy of a page from the record on appeal in this action (217a-218a). Finally, against Eberle's deposition testimony, the trial court had the testimony given during the trial, in person, by Kelly, who recounted his telephone conversation with Eberle (146a-147a). On all of this evidence, Judge Frankel understandably concluded that Casey, Lane & Mittendorf had been authorized to represent Eberle in the summary proceeding.

#### **The agreement of June 7, 1968**

No order had been signed by Justice Riccobono in the summary proceeding by Friday, June 7, 1968, the last day for tender of the stock to Unger. On that day, the stockholders, Kelly and Unger gathered at Modern's office (800a-801a). Without the Arlinghaus and Eberle stock certificates, no sale of the stock could be consummated. Moreover, the sale of the assets was not a genuine alternative (98a-102a). Because of tax consequences and reserves for contingent liabilities, the net proceeds to the stockholders would be substantially smaller in an asset deal. (*Ibid.* and 815a). There was a serious question as to whether Modern could deliver to the purchasers certain of its contracts, accounting for very substantial revenue, since those contracts were not assignable and, therefore, would only be available to the new owners if the customers should agree to substitute the new owners as the contracting party (98a-99a).

In the intervening week, Oard, who as a potential stockholder in the new company had an interest in seeing the tender offer met (334a), had been in contact with Pepper and had offered on his own "hook" to attempt to persuade the stockholders to pay him \$25,000 (258a). Pepper had refused. Pepper's co-broker, Steve Weil, during the same period had initiated negotiations with Unger at Pepper's request (810a-811a). On June 7, Unger and Weil were in communication again. Their recorded conversations, the accuracy of which is conceded (Trial Stipulation), show that the first recorded telephone conversation was had at 11:35 A.M.\* In that conversation, Weil told Unger that if somebody were to reach an agreement with Pepper, he would turn everything over the same day (778a). Evidently there was some question as to who would pay Pepper (779a). The figure of \$75,000 had already been mentioned, and it is obvious from the conversation that this figure had come from Pepper:

"Mr. Unger: Let's do this then: Let's talk about a realistic figure with that guy. Seventy-five thousand bucks is a lot of money.

Mr. Weil: Well, you know he paid, what do you call it, to Nizer, five thousand or forty-five hundred, and he paid them ten thousand that he has on retainer". (780a)

Weil told Unger the matter was still settleable "like today. Monday who knows". (781a). Weil could not reach Pepper; Pepper was to call him. (*Ibid.*). Unger suggested \$50,000. (*Ibid.*). Toward the end of the conversation, Weil again made the point that "... because with him [Pepper] taking off, it would be a real problem" (783a), and,

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\* There had been an earlier communication at 11 A.M., when Unger returned Weil's initial call. (812a).

moments later "You know, Sidney takes a month or two months off and he goes on these safaris to New Guinea, Africa, way-out places; go and try to reach him there." (784a).

Weil called back at 12 noon (786a). His message from Pepper was that "... after today, there is no settlement: not for seventy-five, not for a hundred, period." (*Ibid.*). Pepper had told his lawyer not to tell anyone where he was; "[i]n fact, he is not even going home tonight." (787a).

Pepper contends that Unger had not given appellees a deadline of June 7 (but see Exh. JJJ) and that June 7 therefore was not a crisis date (Appellant's Br. p. 43). It is clear from the facts discussed above that, quite apart from Unger's requirement, it was Pepper's own conduct that created the crisis. Pepper, through Weil, gave the stockholders to understand that, unless they did business with him that same day, June 7, they might be unable to retrieve the stock certificates for another two months. There was no use trying to serve papers on Pepper, as he was in hiding. His attorney was not allowed to tell where he was, and he would not go home that night. Thus appellees were clearly presented with a crisis, and one of Pepper's making.

Weil got back to Unger at 1:17. Unger told him "We'll enter the agreement for \$75,000." (789a). Pepper's lawyer was to prepare the agreement for review at Modern (791a). Weil was to call Rosen. (*Ibid.*).

By 1:45 Pepper still had not contacted Weil (793a). Evidently the stockholders had not decided who would pay Pepper, if he was to be paid (795a).

At 2:20 Weil called. He had just spoken with Pepper (796a). He gave Unger Rosen's name (*Ibid.*). Pepper was going to the bank to get the papers (798a).

The proceedings at Modern during the discussion of Pepper's claim have been recorded in a transcript, the accuracy of which is conceded (Trial Stip. pp. 1-2).<sup>\*</sup> The minutes show that all of the stockholders except Eberle were present. At the outset, Kelly summarized the events of the preceding weeks (802a-806a). He referred to his meeting with Pepper on May 22, pointing out with reference to Pepper's claim of services that "[n]obody that I have spoken to at the corporation, none of the officers, none of the shareholders, has any idea that this was a valid claim." (803a-804a).

Kelly related that a week or so earlier someone had suggested paying Pepper an amount (\$25,000 to \$50,000) (806a). When Kelly subsequently had heard about this, he had advised his clients that "unless somebody could tell me a reason why Pepper should get any money whatever, I would have to characterize this as a scheme of blackmail. I could not recommend it." (807a). He repeated "... I and our firm, in fact, would not recommend the payment of blackmail to anybody at any time, particularly in this situation where Mr. Pepper, on the face of it, did not have any claim whatever to any money as far as anyone has been able to tell us." (*Ibid.*). Following this advice, the feasibility of selling the assets to Unger had been explored, unsuccessfully (808a-809a; 815a; see 98a-102a). The asset route was far less profitable, and more risky, to the stockholders (see the discussion, above).

After Kelly's presentation, Unger related to the stockholders his previous conversations with Weil, who was in contact with Pepper (810a-814a). Unger had had conver-

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<sup>\*</sup> In a letter to Harper & Matthews (Pepper's then attorneys) dated October 2, 1973, with which a copy of the transcript was delivered, Kelly pointed out an obvious error in the record. (824a).

sations with Weil over the preceding two weeks or so (811a). Pepper had wanted \$100,000 to begin with, but on May 28, Weil advised Unger that Pepper would take \$50,000 "if he, Weil handled the transaction." (811a). Unger had not heard from Weil the following week (812a). On the morning of the meeting, June 7, Unger got a communication from Weil, the essence of which was that Pepper now wanted \$75,000 (811a-812a). Unger related to the stockholders Weil's statement that he did not know where Pepper was and that "Pepper is going out of the country Monday and if we don't resolve this, we won't be able to do this for two months." (812a-813a). Unger interpreted this message to be "great pressure or blackmail." (814a).

Unger next informed the stockholders that if they were to go the asset route, there would be a recapture of depreciation, which would result in a lowering of the purchase price by at least \$1.00 and maybe \$1.25 per share. (*Id.*, 814a-815a). (At trial, Vickers, Modern's treasurer and secretary, confirmed the accuracy of the estimate (101a)).

Unger pointed out that "Pepper's agreement, if an agreement is entered into, is as good as the courts will say it is, and it seems to me that if this isn't an agreement that's entered into under coercion, it's a near relative." (815a-816a). Kelly, however, refused to give an opinion as to whether the stockholders would be able to get out of the agreement (816a). He suggested that the situation might fall in the category of threat or duress. (*Ibid.*).

Modern's president, Lenz, made a statement, which he prefaced by saying that no one in the room was particularly interested in seeing Pepper "get a dime." (816a). "We all hate to have to knuckle down to an individual who, at least, has very doubtful ethics and I am being

very kind when I say that, but the point remains, if Pepper elects to run away for two months, there is possibly no acquisition of the shares from him." (817a). The substance of the rest of the statement by Lenz was to suggest that the stockholders not "sit on . . . high principle" but agree to pay Pepper the \$75,000 demanded by him (818a).

The depositions of cross-claimants give a good insight into the mental processes by which the agreement to "knuckle down" to Pepper was arrived at.

Elsie Cox, with \$554.87 at stake (826a), testified that some stockholders were for and some were against paying Pepper (Tspt., p. 626) and that she kept her mouth shut. (*Ibid.*).

Harry Bogaards thought, on the basis of Pepper's declarations to him, that Pepper had rendered services to the corporation worth \$25,000 (182a-183a). He thought Pepper's \$100,000 claim was for a finder's fee, ". . . certainly not a legal fee" (184a) and felt that he was signing under duress (175a). He had no intention of revoking the agreement when he signed it; there seemed no way out except to sign the agreement (177a-178a).

Hough said he signed the agreement under duress, seeing that it was the last day of the offer and that Unger's checks were waiting (190a). He expected to pay Pepper but hoped that the stockholders wouldn't have to, since the agreement was signed under duress (*Ibid.*). He realized that court action would be necessary if payment were to be avoided (191a). No agreement was reached in that respect; the lawyers would look into whether the stockholders had a case or not (191a-192a). He thought it was "blackmail almost" (192a).

Del Coro compared Pepper's demand to a pistol pointed at his head (194a). He recalls no suggestion that the

stockholders would not have to pay Pepper but remembered that they intended to see whether the agreement could be set aside. (*Ibid.*). He signed the agreement with a mental reservation (196a).

Schlereth testified that the stockholders had been willing to approve payment of \$20,000 or \$25,000 to Pepper and that Pepper's final figure was \$75,000 (236a). There was no discussion about revocation, although she does recall Unger saying that action would be taken to avoid paying Pepper (241a-242a).

Mrs. Arlinghaus felt she signed the agreement under duress (Tspt. pp. 618-619). She did not know whether she intended to pay Pepper when she signed the agreement. (*Id.* p. 623).

Kelly testified that Rosen came to Modern, talked with Unger about the proposed agreement, went away and came back with an agreement (147a-148a). Kelly refused to let his clients sign the agreement in the original form (245a-247a). He approved the final agreement procedurally but not substantively (154a).

In the face of all of the foregoing, Pepper insists that the stockholders' actions on June 7, 1968 constituted a "charade" (Appellant's Br. p. 17). The basis for this contention is the testimony of his co-broker, Weil that Unger told him (Weil) that "we" had no intention of paying Pepper any amount (*Ibid.*). Weil's testimony in this respect cannot be credited, since it conflicts with the, concededly accurate, transcripts of the Weil-Unger telephone conversations (777a-798a). If Unger had in fact made such a statement, and if appellees had concurred in it, Pepper's case would not be helped thereby, for it is clear from the record as a whole that appellees acted under duress in signing the agreement and that it was their intention either to pay Pepper the agreed amount or, if

they decided not to pay, to seek a court determination of the dispute. Unger, himself a lawyer (329a), made it clear that he thought the matter should be pursued in court (815a-816a). Blame can hardly be placed on cross-claimants for knowing, and being told by both of the lawyers present, that they might have an equitable remedy. The transcript of the shareholders' meeting of June 7 (799a-823a) demonstrates that their own attorneys advised them not to go through with the deal and not to accede to Pepper's demands. This advice was overborne by the pressure applied by Pepper.

Pepper also complains that the board and stockholders of Modern turned down the proposition for purchase of Modern made by Cahners, another prospective buyer found by Pepper (Appellant's Br. p. 14). The Cahners proposal was an iffy affair (653a; 700a-718a), conceived by Pepper as an eleventh-hour attempt to block the sale to the Unger group. Cahners first rendezvoused with Pepper at his office prior to driving out with Pepper's associate, Cox, to the May 24th board meeting in New Jersey (Tspt. 456). The Cahners offer might never have led to a sale, let alone a sale at a price equal to the one which Unger stood ready to pay.

Equally importantly, Unger had the acceptance of management, which included three of the appellees.\* This obviously was an important consideration, not only for those stockholders who would continue their association with Modern after the sale but also for the others, who had the officers' and employees' interest at heart. Mrs. Arlinghaus wanted to be sure that the buyer was acceptable to management (351a; 355a). This, then, was an intensely personal decision, in which the marketability of the stock was not the only important factor. Judge Frankel gave due consideration to this (450a-451a).

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\* Bogaards (173a), Del Coro (193a) and Hough (189a).

Finally, Pepper contends that, when he succeeded in frustrating the summary proceeding, appellees should have attempted to utilize other legal processes (Appellant's Br. p. 46). This is an extraordinary statement for Pepper to make in the present state of the record, which makes it abundantly clear that Pepper had the deepest contempt for both his clients' rights and the legal processes and was willing to resort to the most devious and oppressive tactics to avoid and obstruct those processes. Clearly, Pepper would have adopted the same tactics, no matter what form the process took.

### ARGUMENT

No finding may be set aside by this Court unless clearly erroneous, due regard being given to the opportunity of the trial judge to judge of the credibility of the witnesses. Fed.R.Civ.P. 52(a). It is clear from the evidence summarized above that, far from being erroneous, Judge Frankel's findings were compelled by the record before him. For that reason, we shall not discuss the seven cases cited by Pepper except to say that all were decided on facts altogether different from those here presented. Even Pepper's highly selective and greatly distorted statement of the facts (Appellant's Br. pp. 5-18) cannot create a semblance of plausibility for his arguments with respect to those cases. In its prior opinion herein, 454 F.2d 626, this Court ruled that issues of fact were raised which could only be determined following a trial. The trial was held, the factual issues were determined, and it is clear that the evidence supported those determinations. Thus, it is respectfully submitted, this Court must affirm the judgment entered against Pepper on appellees' first cross-claim.

There remain to be discussed only two considerations, which were not argued before this Court on the previous

appeal but which were presented to Judge Frankel. The first consideration arises from the fact that Pepper inserted into his settlement agreement of June 7, 1968, in addition to the provision for payment to him of \$75,000, a provision for the exchange of general releases between himself and his clients (828a). The promise of a general release was potentially highly valuable to Pepper to shield him from the consequences of his misconduct in another transaction with Mrs. Arlinghaus and the estate. Under the authorities, Pepper, by insisting on receiving a general release, abused his lien and lost his right to enforce the settlement agreement (Point I, below).

The second consideration arises from Judge Mulligan's suggestion in his concurrent opinion on the previous appeal herein that proof of exposure to a real loss was a prerequisite to recovery herein. 454 F.2d at 636. This consideration, of course, would come into play only if this Court were to find that Judge Frankel was clearly in error in finding that sale of the assets to Unger would have reduced the proceeds to appellees and that no concrete offers from other buyers were on the scene (450a-451a). If this Court were to set aside those findings, the judgment should be affirmed nonetheless, since under the restraint-of-property authorities, herein applicable, appellees were not required to prove that they were threatened with a loss (Point II, below).

## POINT I

Assuming, *arguendo*, that Pepper had a valid lien for \$75,000, the payment of \$75,000 satisfied the lien, and his demand for a release invalidates the settlement or, at the very least, the release provision of the agreement must be rescinded.

The refusal to turn over property to which another is rightfully entitled unless a release is given constitutes duress which vitiates the transaction. *Ingram v. Lewis*, 37 F.2d 259 (10th Cir. 1930); *Weiner v. Tele King Corp.*, 123 N.Y.S.2d 101 (Sup. Ct., Kings County 1953) (not officially reported).

Even were Pepper's claim to a legal fee of \$75,000 valid, his use of his retaining lien to exact from his client a general release from liability invalidates the agreement. In *Ingram, supra*, trustees who had control over the beneficiary's property threatened to prevent his access to it unless he paid them an exorbitant fee for their services and discontinued with prejudice an action brought against them for alleged breaches of trust. It was held that the dismissal of the action was the equivalent of a release and that a release could not be upheld when obtained by duress, even though that part of the settlement entitling the defendants to some compensation for services rendered was upheld. *Ingram v. Lewis, supra*, at 264. Pepper was under a duty as an officer of the court not to take advantage of his position. See *Robinson v. Rogers*, 237 N.Y. 467, 473, 143 N.E. 647 (1924); Opinions of the Committee on Professional Ethics of the Association of the Bar of the City of New York No. 808 (1955). Pepper's use of his possession of papers obtained during his retainer to secure something beyond compensation for services was wrongful and constituted duress; and benefits, including a release, obtained by duress cannot be retained.

See *Ingram v. Lewis, supra*; *Weiner v. Tele King Corp., supra*.

The promise of a general release which Pepper demanded, and received, on June 7, 1968 was of tremendous potential value to him. When, two months later, Mrs. Arlinghaus brought an action to rescind Pepper's purchase from her of all of her own and forty percent of the estate's stock in Modern's sister company, Modern Teleservice, Inc. ("Teleservice"), Pepper set up the promise of a release in the June 7, 1968 agreement as an affirmative defense.\* Judge Werker held his decision after trial in that action in abeyance pending Judge Frankel's decision in this action. When notified that Judge Frankel had rescinded the agreement of June 7, 1968, Judge Werker rendered his (unreported) decision in the Teleservice action, rescinding Pepper's purchase of Teleservice stock and awarding both compensatory damages and punitive damages against Pepper in favor of Mrs. Arlinghaus and the estate. While the accounting proceeding which Judge Werker directed in that action has not yet been terminated, it is clear that the compensatory damages (Pepper's profits), alone, will amount to not less than \$118,000. Pepper has so conceded.

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\* Mrs. Arlinghaus has reserved her right to an adjudication of her claim that the promise of a general release should not be interpreted to include the Teleservice transaction. Since the promise has been rescinded, the issue of its interpretation will arise only if this Court shall reverse the judgment rescinding it.

## POINT II

**Appellees were not required to prove threat of loss.**

Judge Mulligan, in his concurring opinion in the earlier appeal herein, agreed with the majority that appellees (then appellants) had stated a claim upon which relief could be granted and that the district court's summary judgment order should be reversed. His only point of divergence from the majority was on the issue of proof. Judge Mulligan stated that the cross-claimants must show "exposure to real loss before they can establish their victimization by Pepper." 454 F.2d at 636. It is beyond dispute that they have done so. Assuming, however, for the purpose of argument, that they have not carried that burden, the judgment should be affirmed nonetheless.

It is the rule in New York that refusal to surrender goods owned by another except upon compliance with an unlawful demand is "duress of goods". *First National Bank v. Pepper, supra*. Any contract made under those circumstances is deemed to have been made under compulsion and duress. *Cowley v. Fabien*, 204 N.Y. 566, 97 N.E. 458 (1912); *Weiner v. Tele King Corp., supra*. In such a case, it has never been a condition to recovery that the party asserting the duress show that allowing the other party to retain possession of the goods would, inescapably, cause pecuniary damage. The mere fact that such a party prevents the rightful owner's use of the property works an unlawful coercion upon the owner. See *Scholey v. Mumford*, 60 N.Y. 498 (1875).

## CROSS-APPELLANT'S BRIEF

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### Question Presented

Did the District Court err in refusing to accord full faith and credit to the judgment rendered against Pepper by the Monmouth County (New Jersey) Court, Probate Division?

The District Court held that the New Jersey court lacked personal jurisdiction over Pepper and that, therefore, he was not bound by the judgment.

### Statement of the Case

On August 30, 1971, a judgment against Pepper in favor of Mrs. Arlinghaus was entered in the Monmouth County (New Jersey) Court in the amount of \$19,842.19, together with interest thereon from January 2, 1968 (865a). Judge Frankel dismissed Mrs. Arlinghaus' fourth counter-claim, in which she sought to enforce that judgment under the full faith and credit clause of the United States Constitution.

### The Basis for the Judgment

Pepper, as attorney for the estate of Mrs. Arlinghaus' husband, a New Jersey resident, sent Mrs. Arlinghaus, the executrix of the estate, periodic statements for legal fees and disbursements. Under New Jersey law, an executrix is permitted to pay legal expenses as they become due rather than seek court approval for payment of each bill. These payments are then approved or disapproved

in a formal accounting. Such a procedure obviously benefits the attorney for the estate, since he is not forced to await a final accounting before he receives his payment. In the instant case, Pepper's charges were paid as they were received. However, when Mrs. Arlinghaus discovered that Pepper had been guilty of misconduct and that his fees were unearned, a proceeding was brought on by an order to show cause to recover the monies previously paid (853a). Pepper was served by mail, but instead of following the procedure specified by New Jersey law to justify his fees, he sent a letter and an affidavit to the Court, in which he denied that New Jersey could assert personal jurisdiction over him.\* He did not deal with the merits of the action, except to make the conclusory allegation that he had worked over 1,000 hours on Estate matters, a patently absurd figure (860a-863a). He did not appear in the action, and the aforementioned judgment was entered against him.

Judge Frankel refused to give full faith and credit to this judgment on the grounds that New Jersey's assertion of personal jurisdiction was ineffectual (456a). It is respectfully submitted that the New Jersey court did obtain *in personam* jurisdiction over Pepper and that its judgment was, therefore, entitled to full faith and credit.

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\* Wrote Pepper: "[t]his letter is accordingly to be deemed a nullity, as if not submitted by me, if its submission by me could constitute a submission by me to the jurisdiction of a Court of New Jersey." (Exh. 860a).

## ARGUMENT

**The judgment of the New Jersey County Court is entitled to full faith and credit.**

Public policy dictates that there be an end to litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties. *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931). The full faith and credit clause, Article IV, Section 1 of the Constitution and its implementing statute, 28 U.S.C.A. §1738, mandates the extraterritorial recognition of state judgments. This mandate is designed to:

". . . establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered. . . . Because there is a full faith and credit clause a defendant may not a second time challenge the validity of plaintiff's right which has ripened into a judgment. . . ." *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439-40 (1943).

Under that clause, federal courts must accord full faith and credit to the judgments of state courts. *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183 (1941); *Davis v. Davis*, 305 U.S. 32 (1938).

Pepper received actual notice of the New Jersey action, by mail, pursuant to N. J. Civ. Prac. Rules 4:4-4(c)(2) and (e) and Rule 4:4-5(b). Such service by mail clearly satisfies the Constitutional requirements of notice and opportunity to be heard. See, e.g., *Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956); *Modern Cycle Sales, Inc. v. Burkhardt-Larsen Co.*, 395 F.Supp. 587, 592 (E.D.

Wisc. 1975); *In re Law Research Services, Inc.*, 386 F. Supp. 749, 757 (S.D.N.Y. 1974); Fed R. Civ. P. 4(i)(1)(D). Pepper's letter to the Court further demonstrates that he had notice and an opportunity to be heard. Thus the only issue before this Court under the fourth cross-claim of Mrs. Arlinghaus is whether the New Jersey court had jurisdiction of Pepper at the time its judgment was entered. *Riley v. New York Trust Co.*, 315 U.S. 343 (1942); *Roche v. McDonald*, 275 U.S. 449, 451 (1928). It is respectfully submitted that the New Jersey court did have personal jurisdiction over Pepper and that he is bound by the New Jersey judgment.\*

New Jersey's long arm statute, N.J. Civ. Prac. R. 4:4-4(e), grants jurisdiction to the maximum extent permitted by the Constitution:

"Our long-arm rule, unlike statutes in some states, permits service on non-resident defendants subject only to 'due process of law'. R. 4:4-4(e). In other words, we will allow out-of-state service to the utmost limits permitted by the United States Constitution. See *Roland v. Modell's Shoppers World of Bergen Cty.*, 92 N.J. Super. 1, 7, 222 A.2d 110 (App. Div. 1966)." *Ardel Corp. v. Mecure*, 58 N.J. 264, 268, 277 A.2d 207, 209 (1971).

See also *Hoagland v. Springer*, 74 N.J. Super. 275, 181 A.2d 193 (Law Div. 1962), *aff'd*, 75 N.J. Super. 560, 183 A.2d 678 (App. Div. 1962), *aff'd*, 39 N.J. 32, 186 A.2d 679 (1962); *Bernardi Bros. v. Pride Mfg., Inc.*, 427 F.2d 297, 298 (3rd Cir. 1970); *Japan Gas Lighter Association*

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\* Because Pepper chose not to litigate the factual basis of jurisdiction, despite the opportunity to do so, that issue is not before this Court. See *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 438 (3rd Cir. 1971).

v. *Ronson Corp.*, 257 F.Supp. 219, 231 (D.N.J. 1966). Clearly, Pepper was subject to that State's *in personam* jurisdiction, for the claim against him arose out of alleged services performed by him in connection with the administration of a will offered for probate in New Jersey.

As stated by Mr. Chief Justice Stone in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945):

"[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' *Milliken v. Meyer*, 311 U.S. 457, 463."

If a defendant meets the test enunciated by *International Shoe, supra*, then he may be sued in that forum for all purposes, to the full extent that he may be sued in the state of his domicile or the state of his principal place of business. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952).

However, the issue in the instant case is not whether Pepper's contacts with New Jersey are sufficient to support *in personam* jurisdiction in a suit unrelated to those contacts. If it were such a case, it may be that Pepper's contacts with New Jersey were not extensive enough to support the assertion of jurisdiction. On the other hand, since the judgment is based on Pepper's fees in connection with the administration of a New Jersey estate, the claim is based on actions which clearly had substantial New Jersey impact and, therefore, Pepper was subject to the jurisdiction of that state for the purposes of the instant action. See *W.A. Kraft Corp. v. Terrace On the Park, Inc.*, 337 F.Supp. 206, 207 (D.N.J. 1972). The

relevant test is summarized in the Restatement (Second) of Conflict of Laws 2d, §37 (1967), which provides:

"A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to causes of action arising from those effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable."

Pepper certainly could foresee that his retention as attorney by a New Jersey estate would have effects in New Jersey. The fees which the New Jersey court found to be unearned were asserted against a New Jersey estate and were paid by a New Jersey executrix. Pepper can hardly claim to have performed legal services in connection with the administration of a New Jersey estate and then assert that he had no contact with that state. See Note, "Attorneys: Interstate and Federal Practice," 80 HARV.L.REV. 1711, 1715 (1967). As in every other state, control over the probate of the estates of its residents is of great interest to New Jersey, and the administration of those estates is heavily regulated. These factors make Pepper's claim that New Jersey violated his due process rights even more specious. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Henry L. Doherty & Company v. Goodman*, 294 U.S. 623 (1935). This case is certainly not an example of an action in which unilateral activity on the part of the plaintiff is used to drag an unsuspecting and unwilling defendant into a foreign forum. See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The basic issue is one of fairness, and under the facts of this case, it was abundantly fair to require Pepper to defend the New Jersey action. See *Jetco Electronic Industries, Inc. v. Gardiner*, 473 F.2d 1228, 1234 (5th Cir. 1973). The interests of New Jersey so predominate over

those of any other state that there should be no question that it properly exercised jurisdiction as the most logical and convenient locus to try the case. See *Lee v. Walworth Valve Co.*, 482 F.2d 297, 299 (4th Cir. 1973); *Ajax Realty Corp. v. J. F. Zook, Inc.*, 493 F.2d 818, 822 (4th Cir. 1972). Furthermore, the fact that the cause of action did not arise out of facts done in New Jersey is not relevant. Pepper's actions and failures to act in New York had effects in New Jersey although he was not physically present there. *McGee v. International Life Ins. Co.*, *supra*; *Honeywell, Inc. v. Metz Apparatewerke*, 509 F.2d 1137, 1144 (7th Cir. 1975); *Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 308 N.Y.S.2d 337, 256 N.E.2d 506 (1970). Under the applicable test, the fact that Pepper represented an estate located in New Jersey establishes the minimum contacts necessary to render him amenable to suit in that state. See *Central Operating Co. v. Utility Workers of America*, 491 F.2d 245, 250 n. 5 (4th Cir. 1974).

One of the important factors underlying the decision in *McGee*, *supra*, was the Supreme Court's conclusion that California, the forum state, had a great interest in providing a forum for its residents when non-resident insurers refused to pay claims. In *McGee*, a Texas insurance company had mailed a certificate and offer of reinsurance to a California resident in California. The California resident accepted the offer in California and thereafter mailed all premium payments from California to Texas. The Texas company had neither solicited nor done any other business in California and had no other contacts with California. Nevertheless, the Court held that a California court's exercise of personal jurisdiction over the non-resident corporation was consistent with due process, holding:

"It is sufficient for purposes of due process that the suit was based on a contract which has substan-

tial connection with that State [California]." 355 U.S. at 223.

Finally, it is clear that the convenience of the parties mandates New York jurisdiction. Pepper was subject to suit in New York and defending a lawsuit in New York is not substantially more convenient than doing so in New Jersey. Having all matters concerning the estate litigated in the estate proceeding economizes judicial time and effort and is more convenient to all of the parties, a further factor to be considered. See *Midland Forge, Inc. v. Letts Industries, Inc.*, 395 F.Supp. 506, 514 (N.D. Iowa 1975). Justice Frankel implicitly recognized this fact when he stated:

"While probate administration is a subject of special concern and regulation for the states, a condition which in some circumstances justifies exceptional extension of *in personam* jurisdiction [Citations], New Jersey can protect that interest by regulating the disbursement of funds out of the estate, supervising the executor, and scrutinizing payments before they are made." (4:7a)

However, it is respectfully submitted that such a position is untenable. According to that analysis, the New Jersey Court could constitutionally have entered a binding judgment declaring that Pepper was not entitled to any fees from the estate, if Mrs. Arlinghaus had not paid Pepper's bills when they were made. Yet, Judge Frankel held that because New Jersey law permits the payment of the fees as they are incurred, the same New Jersey Court lacks the power to enter the same binding judgment. Clearly, the New Jersey law is for the benefit of those who perform continuing services for an estate, and Pepper invoked the benefits of that law. See *Hanson v. Denckla, supra*.

Thus, based on New Jersey's interest in the equitable administration of estates of its residents, the fact that Pepper contracted to perform services for an executrix of that state and the fact that Pepper was obviously aware that his conduct would have an effect in New Jersey, *in personam* jurisdiction over Pepper was constitutionally asserted by that State. Its judgment, therefore, is entitled to full faith and credit.

### CONCLUSION

The judgment rendered in favor of appellees on their first cross-claim should be affirmed; the judgment rendered against cross-appellant dismissing her fourth cross-claim should be reversed; and judgment should be directed in favor of cross-appellant and against appellant on the fourth cross-claim in the amount of \$19,842.19 with interest from January 2, 1968.

Respectfully submitted,

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*Of Counsel*

PREBEN JENSEN

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